



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 15, 1996

Ms. Susan K. Steeg  
General Counsel  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

OR96-1882

Dear Ms. Steeg:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 101293.

The Texas Department of Health (the "department") received a request for information relating to a specific request for proposal. You submitted to this office a portion of the requested information which you assert should be excepted from required public disclosure by section 552.110 of the Government Code. You indicated that "the third party with a potential property interest at issue did mark certain pages of the bid submitted as 'confidential.'" We have considered the exception you claim and reviewed the submitted information.

You indicate that the department notified the three companies whose third-party interests may be affected by the request for information and solicited arguments regarding whether the information requested is confidential. Pursuant to section 552.305, we notified the Lewin Group, Coopers and Lybrand, L.L.P., and the Scheur Management Group, Inc., whose proprietary interests may be implicated by this request for information and provided them with an opportunity to claim that the information at issue is excepted from disclosure. See Gov't Code § 552.305; Open Records Decision No. 542 (1990). However, only the Lewin Group responded to our notification, arguing that certain specific information in its proposal is excepted from disclosure "as confidential and proprietary." As the other two companies did not respond, the requested information regarding their proposals is presumed public and must be released. Therefore, we will only consider whether the requested information relating to the Lewin Group is excepted from disclosure under section 552.110.

Section 552.110 of the Government Code excepts from disclosure:

A trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. . . .

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added).<sup>1</sup> Although the department cites to the six factors that the Restatement lists as indicia of whether information constitutes a trade secret, neither the department nor the Lewin Group have provided any arguments regarding trade secrets. We conclude that neither the department

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

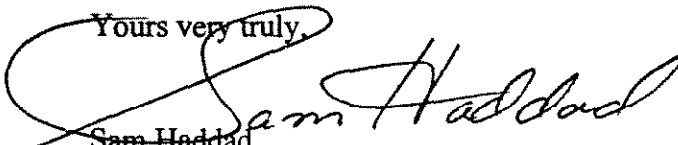
nor the Lewin Group have demonstrated that any of the requested information constitutes trade secrets. Therefore, the requested information is not excepted from disclosure under the trade secret prong of section 552.110.

Commercial or financial information may be excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. Consequently, if a governmental body or other entity can meet the test established in *National Parks*, the information may be withheld from disclosure.

To be held confidential under *National Parks*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks*, 498 F.2d at 766. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. Moreover, "[t]o prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted); *See* Open Records Decision No. 639 (1996) at 4. The Lewin Group, however, has failed to provide specific factual or evidentiary material for this office to determine that release of the requested information will cause substantial harm to its competitive position. Additionally, we do not believe that the department has demonstrated that the release of the information will impair its ability to obtain necessary information in the future. *See, e.g., Bangor Hydro-Elec. Co. v. United States Dep't of the Interior*, No. 94-0173-B, slip op. at 9 (D. Me. Apr. 18, 1995) (no impairment because "it is in the [submitter's] best interest to continue to supply as much information as possible"); *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed"). We conclude that neither the department nor the Lewin Group have met their burden under *National Parks*. Therefore, the department may not withhold any of the requested information under the second prong of section 552.110. Consequently, the department must release all of the requested information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,  
  
Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/ch

Ref.: ID# 101293

Enclosures: Submitted documents

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